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No. 84-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PRUDENTIAL FEDERAL SAVINGS
AND LOAN ASSOCIATION,
Petitioner,

VS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of liquidated damages under the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1982) is authorized absent proof of a specific intent to violate its provisions.

2. Whether an award of liquidated damages under the ADEA is authorized where the employer shows that the act or omission giving rise to the violation was taken in good faith.

3. Whether an award of future damages in lieu of reinstatement is authorized under the ADEA.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Opinion Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
I.	
The Circuits are in Conflict as to Whether Proof of Specific Intent is a Requirement to Award Liquidated Damages Under the ADEA	
1. The Court of Appeals failed to correctly apply statutory policy underlying the willfulness requirement	8
2. Even if liquidated damages are to be recoverable upon proof of knowledge of the ADEA, Prudential is entitled to a good faith defense	10
II.	
The Circuits are in Conflict as to Whether Damages for Future Economic Loss are Available Under the ADEA	12
Conclusion	19
Opinion of the Court of Appeals	App. p. A-1

TABLE OF AUTHORITIES

Cases Page

Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), cert. granted, ____ U.S. ____, 104 S.Ct. 1706 (April 2, 1984) 1, 7

Air Line Pilots Association, International v. Thurston, ____ U.S. ____, 104 S.Ct. 1706 (April 2, 1984) 1, 6

Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1183-85, 1190-91 (6th Cir. 1983) 7, 8, 11

Bleakley v. Jekyll Island-State Park, 536 F. Supp. 236, 244-45 (S.D. Ga. 1982) 14

Blim v. Western Electric Co., 731 F.2d 1473, 1481 (10th Cir. 1984) 17, 18

Cancellier v. Federated Department Stores, 672 F.2d 1312, 1319 (9th Cir.) cert. denied, 459 U.S. 859 (1982) 12

Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978) 14

Donovan v. Simmons Petroleum Corp., 725 F.2d 83, 85 (10th Cir. 1983) 7

EEOC v. Central Kansas Medical Center, 705 F.2d 1270, 1274 (10th Cir. 1983) 7

EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980) 16

Elliot v. Group Medical & Surgical Service, 714 F.2d 556, 558 n.2 (5th Cir. 1983) 11

Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 809-10 (8th Cir. 1982) 14

Foit v. Suburban Bancorp, 549 F. Supp. 264, 267 (D. Md. 1982) 14

Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982) 12

TABLE OF AUTHORITIES

CASES

Page

Ginsberg v. Burlington Industries, Inc., 500 F. Supp. 696, 700 (S.D.N.Y. 1980) 14, 18

Goodman v. Heublein, Inc., 645 F.2d 127, 129-30 (2d Cir. 1981) 11

Hays v. Republic Steel Corp., 531 F.2d 1307, 1311-12 (5th Cir. 1976) 10, 11

Hedrick v. Hercules, Inc., 658 F.2d 1088, 1096 (5th Cir. 1981) 7, 11

Hill v. Spiegel, Inc., 708 F.2d 233, 238 (6th Cir. 1983) 11

Jaeco Pump Co. v. Inject-O-Meter Manufacturing Co., 467 F.2d 317, 319 (10th Cir. 1972) 16

Jaffee v. Plough Broadcasting Co., 19 Fair Empl. Prac. Cas. (BNA) ¶9062 (D. Md. 1979) 14

Kelly v. American Standard, Inc., 640 F.2d 974, 979-80 (9th Cir. 1981) 7, 8

Kolb v. Goldring, Inc., 694 F.2d 869, 874 n.4 (1st Cir. 1982) 12, 14

Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1166 (S.D.N.Y. 1983) 8

Loeb v. Textron, Inc., 600 F.2d 1003, 1020 n.27, 1023 (1st Cir. 1979) 7, 11, 15

Lorillard v. Pons, 434 U.S. 575, 583-84, 98 S.Ct. 866, 870-72 (1978) 11, 12, 18

Martinez v. Behrings Bearings Service, Inc., 501 F.2d 104 (5th Cir. 1974) 14

McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971) 10

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332 (1960) 17

Table of Authorities

Cases

Page

Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971) 14, 15

O'Donnell v. Georgia Osteopathic Hospital, Inc., 574 F. Supp. 214, 223 (N.D. Ga. 1983) 11

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 439 (10th Cir. 1983) 16

Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 686-88 (7th Cir.), cert. denied, 459 U.S. 1039 (1982) 14

Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959) 14

Rogers v. Exxon Research and Engineering Co., 550 F.2d 834 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978) 14

Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1113-14 (4th Cir.), cert. denied, 454 U.S. 860 (1981) 7

Syvock v. Milwaukee Boiler Manufacturing Co., 665 F.2d 149, 154-56 (7th Cir. 1981) 7, 8, 9

Trans World Airlines, Inc. v. Thurston, ____ U.S. ____, 104 S.Ct. 1412 (Feb. 27, 1984) 1, 5

United States v. Bishop, 412 U.S. 346, 356, 93 S.Ct. 2008, 2015 (1973) 8

United States v. Griffith, Gornall & Carman, Inc., 210 F.2d 11 (10th Cir. 1954) 16

Vazquez v. Eastern Airlines, Inc., 579 F.2d 107 (1st Cir. 1978) 14

Wehr v. Burroughs Corp., 619 F.2d 276, 283-84 (3d Cir. 1980) 7, 11, 18

TABLE OF AUTHORITIES

Statutes

	Page
Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1982)	passim
Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq.	8
28 U.S.C. § 1254(1) (1982)	2
28 U.S.C. § 451, 1337, 1343 and 1345	4
29 U.S.C. § 211(b) (1982)	13
29 U.S.C. § 216 (1982)	3, 8, 10, 13, 14
29 U.S.C. § 217 (1982)	13
29 U.S.C. § 260 (1982)	10
29 U.S.C. § 621 (1982)	12
29 U.S.C. § 626(b) (1982)	2, 6, 10, 13, 16, 17
29 U.S.C. § 627 (1982)	9
29 C.F.R. § 1627.10 (1984)	9
H. R. Conf. Rep. No. 950 on Age Discrimination Act Amendments of 1978, 95th Cong., 2d Sess. 13-14, reprinted in 1978 U.S. Code Cong. & Ad. News 504, 535	16

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Prudential Federal Savings & Loan Association (Prudential), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 7, 1984. The Court has granted certiorari to the Second Circuit in two cases involving one of the issues raised here. *Trans World Airlines, Inc. v. Thurston,* ____ U.S. ____, 104 S.Ct. 1412 (Feb. 27, 1984); *Air Line Pilots Association, International v. Thurston,* ____ U.S. ____, 104 S.Ct. 1706 (April 2, 1984) (consolidated on appeal), case below *Air Line Pilots Association, Internationl v. Trans World Airlines, Inc.,* 713 F.2d 940 (2d Cir. 1983).

OPINION BELOW

The Opinion of the Court of Appeals is reported at 741 F.2d 1225 (10th Cir. 1984), the slip opinion of which appears in the Appendix hereto. No opinion was issued by the District Court for the District of Utah.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 7, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) (1982).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 29

   Section 626(b)

   The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

* * * *

2. United States Code, Title 29

Section 216(b)

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

* * * *

STATEMENT OF THE CASE

In the late 1970's, the savings and loan business entered a serious depression as a result of adverse economic conditions. In 1979, Prudential's management foresaw the impending economic downturn and chose to adopt stringent cost-cutting measures to maintain the company's viability. A Coordinating Committee was organized to study every facet of the company and recommend consolidation or elimination of all nonessential positions and personnel. These recommendations resulted in a massive, on-going reduction in force. From 1979 to 1982, the number of full-time employees was cut nearly in third, declining from 203 to 84. T. at 849(18)-851(23).

One of the individuals discharged in the reduction in force was Douglas Tanner, then age 54. At the time of his termination Tanner had been with Prudential twenty-seven years and was the Acquired Property Manager responsible for follow-up on foreclosures and managing the properties acquired in foreclosure until those properties could be sold. He was the only person engaged in this activity. T. at 637(24)-638(1). In early 1980, Prudential had an average of only ten foreclosures a month and three or four acquired properties. T. at 621(9-23), 638(2-11). The Coordinating Committee found that these duties could

not justify a full-time position and the position of Acquired Property Manager was eliminated in March, 1980. The work of the Acquired Property Manager was thereafter handled by two or three employees in existing positions in a fraction of their time and with no disruption in their other responsibilities. T. at 581(9)-583(10), 103(9)-104(14).

In carrying out the reduction, Prudential sought wherever possible to reassign rather than terminate an employee whose position had been eliminated. T. at 750(21)-757(1), 785(3-7), 865(22)-866(13). As Tanner admitted, however, in March, 1980, there were no other open positions to which he could have been reassigned. T. at 104(15-19). Tanner was therefore discharged, although he was kept on Prudential's payroll at full salary for nearly eight months so that he would be eligible for increased retirement benefits. T. at 114(5-19). In addition to this severance pay, Tanner received upon his discharge one month's vacation pay, a lump sum retirement fund of approximately $64,000, and Prudential stock valued at $8,700. T. at 115(6)-116(6).

In 1981, the Equal Employment Opportunity Commission (EEOC) brought this action against Prudential alleging that Prudential violated the ADEA when it discharged six employees and demoted a seventh. Jurisdiction of the district court was invoked under Section 626(b) of the ADEA and under 28 U.S.C. §§ 451, 1337, 1343 and 1345. After a week-long trial, the jury returned a verdict that no discrimination had been established with respect to six of of the seven employees. The jury found Prudential liable under the ADEA to Tanner and determined that Tanner had been damaged in the amount of $34,200. However, the jury also determined that the termination of Tanner was not willful. The district court entered judgment in the amount of the verdict, and awarded Tanner an additional $17,000 for future damages "in lieu of reinstatement."

Prudential and the EEOC appealed the district court's judgment only insofar as it related to Tanner. On appeal, the EEOC argued that the district court erred in instructing the jury that proof of a willful violation of the ADEA requires a showing of specific intent to violate the ADEA. Prudential argued that the district court was correct in its instruction on willfulness. Prudential also argued that the district court's award of future damages is not authorized by the ADEA. The United States Court of Appeals for the Tenth Circuit affirmed the verdict and the district court's award of future damages. The Court of Appeals also found the trial court had erred in instructing the jury that an award of liquidated damages under the ADEA was appropriate only if the jury found that Prudential had acted with specific intent to violate the provisions of the ADEA.

REASONS FOR GRANTING THE WRIT

I.

The Circuits are in Conflict as to Whether Proof of Specific Intent is a Requirement to Award Liquidated Damages Under the ADEA.

The Tenth Circuit held that liquidated damages (double the amount of lost wages and benefits) may be awarded under the ADEA if the employer was or should have been aware that its employees were covered by the ADEA. In so ruling, the court joined the six other Circuit Courts who would make liquidated damages virtually automatic for every ADEA violation and adopted a rule that emasculates the legislative intent of awarding such damages only upon proof of "willful" misconduct. The Tenth Circuit rejected the position of the Seventh and First Circuits that liquidated damages can be awarded only upon proof that the employer knew or should have known he was violating the law. The Court has granted certiorari in *Trans World*

Airlines, Inc. v. Thurston, ____ U.S. ____, 104 S.Ct. 1412 (Feb. 27, 1984) in which one of the issues raised is this very question of whether specific intent is required to establish a willful violation under the ADEA. Certiorari has also been granted in a companion case and the cases have been consolidated on appeal. *Air Line Pilots Association, International v. Thurston*, ____ U.S. ____, 104 S.Ct. 1706 (April 2, 1984). The issues raised here should be resolved in consolidation with those cases.

The district court's instruction followed the authority of the Seventh and First Circuits. The district court defined a willful violation to mean

> when a person acts with specific intent to violate the law, where with knowledge of the law he proceeds, or it proceeds to violate the law knowingly and intentionally.
>
> In other words, you can find willful discrimination for age, or a willful violation of the law, only if you find both that Prudential violated the law by discharging or reassigning complaining employees because of their age, and that Prudential knew, or should of known at the time that it decided to discharge or reassign the complaining employees, that such decisions and actions were in violation of the law and were intentionally and knowingly done in violation thereof.

T. at 33(16)-34(3).

This instruction is consistent with the language of the ADEA which expressly limits damages by the *proviso* that "liquidated damages *shall be payable only* in cases of *willful violations* of this chapter." 29 U.S.C. § 626(b) (1982) (emphasis added).

On appeal, the EEOC argued for the first time that the correct standard for determining when a violation of the ADEA is willful is whether: "(1) the employer knew or

should have known the Act 'was in the picture'; and (2) the employer acted intentionally, knowingly, or recklessly as distinguished from negligently or accidently." Brief of the EEOC as Cross-Appellee and Reply Brief as Appellant, at 20 n.8.

The Tenth Circuit agreed with the EEOC and held that "[a] violation may be willful *even if an employer does not have specific knowledge that his actions violate the Act* . . . . Intead, '[a] violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions.' " *See* slip op. at A-15 (quoting *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 85 (10th Cir. 1983) (quoting *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1274 (10th Cir. 1983) (emphasis in slip opinion)).

Six other circuits have similarly rejected the requirement that a willful violation of the ADEA must include a specific intent to violate its provisions. *See Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *cert. granted*, ____ U.S. ____, 104 S.Ct. 1412 (1984); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1113-14 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981).

Those circuits, however, are in direct conflict with both the Seventh and First Circuits which require that a willful violation occurs only when a defendant knew or should have known that it was violating the ADEA, not just that the ADEA existed. *See Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 155-56 (7th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979). *See*

also Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1190-91 (6th Cir. 1983) (Krupansky, J., dissenting) (specific intent should be required); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1166 (S.D.N.Y. 1983) (specific intent required). For example, in *Syvock*, the court approved a definition almost identical to that contained in the district court's instruction in this case:

> [I]n order to prove willfulness under 29 U.S.C. § 626(b) (1976), a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA.

Id. at 156.

1. The Court of Appeals failed to correctly apply statutory policy underlying the willfulness requirement.

In an effort to define the meaning of the term "willful," context is all important. *See United States v. Bishop*, 412 U.S. 346, 356, 93 S.Ct. 2008, 2015 (1973). It is apparent from studying the language of the ADEA and the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, that Congress, in enacting the ADEA, intended to create a remedy in the form of liquidated damages only for unusually serious or reprehensible violations. Under the FLSA, an employer is liable for liquidated damages for *any* violation of its provisions, 29 U.S.C. § 216(b); but while Congress adopted almost the entire FLSA enforcement mechanism when it enacted the ADEA, it specifically modified the provision relating to liquidated damages to provide for such damages *only* for "*willful*" violations. The award of liquidated damages under the ADEA is "in effect a substitution for punitive damages . . . ," *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981), and, like punitive damages, ought to be reserved for exceptional cases. *See Syvock v. Milwaukee Boiler Manufacturing Co.*,

665 F.2d 149, 154-55 (7th Cir. 1981). The instruction given by the district court and the interpretation followed by the Seventh and First Circuits properly reflect the limitation on damages expressly imposed by Congress.

The interpretation given to the ADEA by the Tenth Circuit, and the other six circuits it followed, effectively erases the *proviso* from the ADEA and makes liquidated damages automatic. The Tenth Circuit held *as a matter of law* that Prudential had acted willfully because Prudential "knew its employees were protected by the ADEA." Slip op. at A-15-16. Congress in enacting the ADEA, however, created a statutory scheme whereby all employers would know or should know about the ADEA. Section 627 of the ADEA, 29 U.S.C. § 627 (1982), requires employers to post notices as required by the Secretary of Labor to effectuate the purposes of the ADEA. Regulations promulgated pursuant to that statutory authorization require the notice to advise employees of the applicability of the ADEA. *See* 29 C.F.R. § 1627.10 (1984). Thus, the ADEA itself requires an employer to know of its provisions and it is difficult to imagine any facts where an employer could be found in a position where he should not have known of the ADEA. If Congress had intended that mere knowledge of the ADEA would automatically expose an employer to liquidated damages, it seems unusual and inconsistent for it to limit the ADEA by requiring proof that the violation was "willful." *See Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 155-56 (7th Cir. 1981) (Congress did not intend liquidated damages to be automatic). The only logical conclusion which gives the term "willful" any practical meaning is that Congress intended something more than mere knowledge of the ADEA to trigger the liquidated damages provision. *See id.* at 156 n.10.

2. Even if liquidated damages are to be recoverable upon proof of knowledge of the ADEA, Prudential is entitled to a good faith defense.

The Tenth Circuit also held that because Prudential had some knowledge of the ADEA, liquidated damages were recoverable against Prudential without regard to whether Prudential's actions were taken in good faith. Slip op. at A-16. In so holding, the Tenth Circuit completely ignored the fact that the good faith defense provided for in the FLSA is at least implicitly incorporated into the ADEA.

Section 626(b) of the ADEA provides that the provisions of the ADEA are to be enforced in accordance with the "powers, remedies, and procedures" provided in the FLSA as amended. In 1947, prior to the enactment of the ADEA, Congress amended the FLSA with the Portal-to-Portal Act of 1947 (PPA), 29 U.S.C. § 260. Section 11 of the PPA provides:

> If the employer shows to the satisfaction of the court that the act or omission giving rise to *such action was in good faith* and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award *no liquidated damages* . . . .

29 U.S.C. § 260 (1982) (emphasis added).

For a court's discretion to be invoked under § 11, an employer must show that the violation was in good faith and predicated upon reasonable grounds. *See McClanahan v. Mathews*, 440 F.2d 320 (6th Cir. 1971). In *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976), the court held that section 216(b) of the ADEA providing for liquidated damages in cases of willful violations did not mean that for every willful violation liquidated damages would be awarded. The court reasoned:

> We do not construe this to mean that [liquidated damages] shall *always* be payable if there is a willful violation, regardless of the good faith of the employer. Such a construction would be inconsistent with the reference to the FLSA, as amended .... In view of the foregoing, we hold that section 11 of the PPA applies to violations under the ADEA.

Id. at 1311-12. *See also Elliot v. Group Medical & Surgical Service*, 714 F.2d 556, 558 n.2 (5th Cir. 1983) (good faith defense available under ADEA); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981) (ADEA incorporates section 11 of PPA and therefore good faith is a defense to an award of liquidated damages); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 574 F. Supp. 214, 223 (N.D. Ga. 1983) (good faith of employer must be considered in awarding liquidated damages).

The Tenth Circuit rejected the good faith of the employer as a defense to liquidated damages, as have some other circuits, *see Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129-30 (2d Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3rd Cir. 1980); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 238 (6th Cir. 1983); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1183-85 (6th Cir. 1983), without analysis and based on dicta in *Lorillard v. Pons*, 434 U.S. 575, 98 S.Ct 866 (1978). In *Lorillard*, this Court noted only that the ADEA does not expressly make reference to § 11, although other sections of the PPA are expressly incorporated. *Id.* at 581 n.8. The Court did not hold that § 11 was inapplicable to ADEA cases. Indeed, a close reading of the ADEA indicates that just the opposite is true. *See Hays*, 531 F.2d, at 1311-12.

II.

The Circuit are in Conflict as to Whether Damages for Future Economic Loss are Available Under the ADEA.

The judgment entered by the trial court gave Tanner, in addition to the $34,200 awarded by the jury, an additional sum of $17,000 "as lost retirement and pension benefits accruing through normal retirement, in lieu of reinstatement." On appeal, the Tenth Circuit rejected Prudential's argument that such an award of future damages is not authorized by the ADEA. The Tenth Circuit acknowledged that its ruling is in conflict with the position of the First Circuit. Slip op. at A-9-11. *See Kolb v. Goldring Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982) (future economic losses not recoverable under the ADEA). The Tenth Circuit rejected the First Circuit position, however, siding with the Eighth and Ninth Circuits which also approve future damages. Slip op. at A-9-11. *See Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982). The position taken by the Eighth, Ninth and now Tenth Circuits, however, is not supported by the language or the purpose of the ADEA. The Court should grant the writ of certiorari to affirm the First Circuit position and resolve the conflict among the Circuits.

The ADEA was enacted to eliminate age discrimination in employment and to promote the employment of older persons based on their ability and not their age. *See* 29 U.S.C. § 621 (1982). To achieve those objectives, Congress patterned the substantive prohibitions of the ADEA after Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872 (1978). The remedial provisions of the ADEA, however, are patterned after those of FLSA:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures

> provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. *Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title* .... In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. * * * *

29 U.S.C. § 626(b) (1982) (emphasis added).

Thus, to determine the "[a]mounts owing to a person" as a result of a violation of the ADEA, a court must examine "the powers, remedies, and procedures provided in sections 211(b), 216 (except subsection (a) thereof), and 217" of the FLSA.[1]

Section 216(b) of the FLSA provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

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[1]Section 211(b) deals with the utilization of state government personnel to enforce the ADEA and § 217 grants jurisdiction to district courts to enforce ADEA provisions. Neither of these sections are germane to the issues here presented.

29 U.S.C. § 216(b) (1982). Nothing in the language of the FLSA authorizes awards of future economic loss; awards of damages are limited to those specified in the FLSA. *See Martinez v. Behrings Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974); *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959). Similarly, damages recoverable for ADEA violations can be no broader than those permitted by ADEA's incorporation of the FLSA remedies. *See Ginsberg v. Burlington Industries, Inc.*, 500 F. Supp. 696, 700 (S.D.N.Y. 1980). Several circuits have repeatedly held that damage remedies under the ADEA are limited to those available under the FLSA. *Pfeiffer v. Essex Wire Corp.*, 682 F.2d. 684, 686-88 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809-10 (8th Cir. 1982); *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978). The First Circuit has expressly held that "damages [for ADEA purposes] are 'settled' on the date of judgment and the plaintiff cannot then recover damages for future economic loss or front pay." *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982). *See also Foit v. Suburban Bancorp*, 549 F. Supp. 264, 267 (D. Md. 1982) (ADEA does not permit recovery of anticipated loss of future earnings); *Bleakley v. Jekyll Island-State Park*, 536 F. Supp. 236, 244-45 (S.D. Ga. 1982); *Ginsberg v. Burlington Industries, Inc.*, 500 F. Supp. 696, 700 (S.D.N.Y. 1980); *Jaffee v. Plough Broadcasting Co.*, 19 Fair Empl. Prac. Cas. (BNA) ¶9062 (D. Md. 1979); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971). *Cf. Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) (denying recovery under the ADEA for pain and suffering and punitive damages); *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (denying ADEA recovery for pain and suffering).

In addition, the rule prohibiting future damages is a necessary corollary of the principle forbidding awards that are merely speculative. Future damages are inherently speculative for at least two obvious reasons. First, even absent discrimination, an employee's future with a particular employer is impossible to predict; the employee "might or might not get raises, reductions, fired, or incapacitated all of which could greatly affect his future earnings . . . ." *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971). *See also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979) (projection of future damages "highly speculative, given the possibilities of promotions or legitimate demotions or terminations"). Second, a former employee's future *outside* a company is similarly impossible to predict; the employee might ultimately find other and better employment, and his new opportunities may be "so lucrative that, in say, ten years he will be better off than if he had stayed with defendant." *Monroe*, 335 F. Supp., at 235.

The present case illustrates these difficulties. Where Prudential's work force was reduced from over 200 to less than 90 within a 30-month period, it is likely that even if a particular and supposedly discriminatory termination decision had not been made, the employee would nonetheless have left or been discharged at a later point. For example, neither of the employees who took over and shared Tanner's former duties was with Prudential by the time of trial. T. at 581(9-23), 863(8-11). Moreover, alternative employment opportunities were in fact better for those who, like Tanner, were discharged early in the reduction in force than for those who were terminated later. T. at 797(8-24). Tanner in fact obtained a similar position with another employer but he quit almost immediately because he did not like the work. T. at 100 (16-17).

Such projections, of course, are inherently speculative; but that is precisely the point. Courts have repeatedly insisted that "damages are not to be awarded when the evidence surrounding them is uncertain, contingent, or speculative." *Jaeco Pump Co. v. Inject-O-Meter Manufacturing Co.*, 467 F.2d 317, 319 (10th Cir. 1972). *See also Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 439 (10th Cir. 1983); *United States v. Griffith, Gornall & Carman, Inc.*, 210 F.2d 11 (10th Cir. 1954).

The opinion of the Tenth Circuit entirely misses the point when it reasons that the uncertainty of future damages should be placed on the employer found to be in violation of the ADEA. Such a policy determination is one properly left to Congress. Congress limited the legal remedies available under the ADEA to unpaid minimum wages and unpaid overtime compensation. *See* 29 U.S.C. § 626(b) (1982). Furthermore, in recognition of the inherent uncertainty and speculation surrounding future economic losses, Congress expressly provided for recovery of liquidated damages for willful violations which produce losses too obscure and difficult to measure. *Id. See* H. R. Conf. Rep. 950 on Age Discrimination in Employment Act Amendments of 1978, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504, 535.

Finally, holding out the possibility of future damages for discharged employees who have not found new jobs by the time of trial would obviously create a powerful incentive for such employees *not* to obtain new work. Such a construction would thus be antithetical to the pronouncements in ADEA cases requiring discharged employees to seek new employment. *See, e.g., EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). Indeed, the possibility of future damages would place discharged employees in a hypocritical situation where self-interest would impel them to appear to seek, but not actually to obtain, new employ-

ment, at least until after trial, with the hope of obtaining a windfall. Again, the present case dramatically illustrates the corrosive effect of such a construction: Tanner actually obtained a new job at First Security Bank involving functions similar to those he had performed at Prudential, but quit after two days because "[t]he nature of the work was disagreeable . . . ." T. at 100 (16-17), and then continued to claim that Prudential should pay his full salary and benefits through age seventy.

Thus, case law, statutory construction, and sound policy all compel the conclusion that future damages are not awardable under the ADEA.

Those circuits which allow the recovery of future economic losses under the ADEA do so by virtue of ADEA language giving "the court . . . jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA] . . . ." 29 U.S.C. § 626(b) (1982). In the instant case, the Tenth Circuit held that "[t]he power to grant equitable relief provided in the ADEA clearly stands in addition to the monetary relief available under the FLSA sections . . . ." Slip op. at A-11. However, the use of the equitable powers of a court to award damages for future economic loss is not supported by the language of the ADEA.

While the equitable power of the court should be used to afford complete relief to an injured party in light of the objectives of the statutory scheme, *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332 (1960), "such equitable powers cannot be used to expand or override the limited legal remedies available under the ADEA." *Blim v. Western Electric Co.*, 731 F.2d 1473, 1481 (10th Cir. 1984) (Seth, C. J., concurring and dissenting).

The ADEA clearly distinguishes between legal and equitable remedies for violation of its provisions. *See*

Lorillard v. Pons, 434 U.S. 575, 583, 98 S.Ct. 866, 871 (1978). In so doing, Congress limited the legal remedies available under the ADEA to "unpaid minimum wages or unpaid overtime compensation." *Id.* at 583 n.11. At the same time, Congress provided for recovery of nonpecuniary or highly speculative pecuniary losses by allowing liquidated damages for willful violations of the ADEA. *Blim*, 731 F.2d, at 1481 (Seth, C. J., concurring and dissenting). Thus, the exercise of a court's equitable power to award future damages undermines the intent of Congress to limit the types of legal damages recoverable.

Even the courts that have accepted the possibility of future damages have contemplated such an award only *in lieu of reinstatement*; and have adamantly refused even to consider such an award where a discharged employee has not sought reinstatement. In *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283-84 (3d Cir. 1980), the court explained:

> Wehr's argument that he is entitled to future damages in lieu of reinstatement presupposes that he wanted to be reinstated. At pre-trial, however, Wehr specifically disclaimed any desire for reinstatement. We therefore conclude that the question whether future damages may be recovered in ADEA cases is not properly before us at this time. [Footnotes omitted.]

Even where a discharged employee does not disclaim a desire for reinstatement, but does not actively seek such relief, reinstatement is precluded. Thus, the court in *Ginsberg v. Burlington Industries, Inc.*, 500 F. Supp. 696, 701 (S.D.N.Y. 1980), denied future damages because reinstatement had not been "genuinely pursued . . . ." *See also Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971).

In the present case, Tanner did not genuinely seek reinstatement. While a significant part of his testimony at

trial focused on his alleged damages, he did not express any desire for reinstatement; nor did he indicate that he had ever applied for a position with Prudential since his discharge. Indeed, Tanner testified that he had obtained a job at a major bank but quit after two days because he did not like the work. T. at 99(15)-100(16). Thus, the evidence not only fails to show that Tanner "genuinely pursued" reinstatement, but affirmatively indicates that he did not even desire such relief. In these circumstances, Tanner is precluded from obtaining future damages even if the ADEA is construed to permit the award of the same.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

United States Court of Appeals, Tenth Circuit, Equal Employment Opportunity Commission, Plaintiff-Appellee, v. Prudential Federal Savings and Loan Association, Defendant-Appellant. No. 82-2444 and 83-1073, Appeal from the United States District Court for the District of Utah (D.C. No. 81-0636).

Clark Waddoups (Stephen G. Crockett and Steven D. Smith with him on the briefs), of Rooker, Larsen, Kimball & Parr, Salt Lake City, Utah, for Defendant-Appellant.

Jeffrey C. Bannon, Attorney (David L. Slate, General Counsel, Philip B. Sklover, Associate General Counsel and Vella M. Fink, Assistant General Counsel, with him on the briefs), Equal Employment Opportunity Commission, Washington, D.C., for Plaintiff-Appellee.

Before Barrett, Doyle and Seymour, Circuit Judges.

Seymour, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) brought this action against Prudential Federal Savings and Loan (Prudential) alleging that Prudential violated the Age Discrimination in Employment Act (ADEA or the Act), 29 U.S.C. §§ 621 *et seq.* (1982), when it discharged six employees and demoted a seventh. The case was tried to a jury, which found that one employee, Douglas Tanner, had been illegally terminated because of his age and awarded him $34,200 in past lost wages and benefits.[1] The jury found that the violation had not been willful and accordingly did not award liquidated damages. As additional equitable relief, the trial judge granted Tanner $17,000 in lost future retirement and pension benefits in lieu of reinstatement.

Both parties have appealed. The EEOC contends that the district court erroneously instructed the jury on the

[1]The jury found in favor of Prudential with respect to the six other charging parties. The EEOC has not challenged these determinations on appeal.

meaning of "willful" as used in the section of the ADEA authorizing the award of liquidated damages for willful violations. In its cross-appeal Prudential asserts that : (1) the district court should have dismissed the action because the EEOC failed to conciliate as required by the ADEA; (2) the court erroneously failed to instruct the jury that the EEOC was required to prove pretext; (3) the evidence was insufficient to support the verdict in favor of Tanner; and (4) the court's award of future damages was erroneous. We affirm in part, reverse in part, and remand for further proceedings.

The facts giving rise to this litigation are briefly as follows. In the late 1970's economic conditions had an adverse impact on the operations of the savings and loan industry. In response, Prudential instituted a reduction in force designed to eliminate all non-essential positions and personnel. Douglas Tanner was one of several employees involuntarily terminated under the reduction in force. Tanner was fifty-four when he was discharged, and he had been with Prudential twenty-seven years. At the time of his termination he was an Acquired Property Manager, responsible for foreclosing on defaulted real estate loans and for managing and selling foreclosed properties. After his termination, two or three other employees performed his work along with their own duties. Prudential did not offer Tanner a position elsewhere in the company.

I.

CONCILIATION

Prudential vigorously argues on appeal that the EEOC failed to satisfy its statutory duty to conciliate in good faith and consequently the trial court erred in failing to dismiss the action on this ground. The ADEA states that "[b]efore instituting any action under this section, the

[EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b). This jurisdictional provision embodies "the congressional intent that enforcement be effected wherever possible without resorting to formal litigation." *Marshall v. Sun Oil Co.* 592 F.2d 563, 565 (10th Cir.), *cert. denied*, 444 U.S. 826 (1979) (*Sun Oil I*).

This court has recognized that the "ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Dartt v. Shell Oil Co.* 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, 434 U.S. 99 (1977). Accordingly, we have refused to dismiss cases where the EEOC failed to exhaust fully its duty to conciliate because to do so would severely hamper enforcement of the ADEA and would be "incompatible with the humanitarian nature of the Act." *Sun Oil I*, 592 F.2d at 566. We have concluded instead that when the EEOC initially makes a sufficient albeit limited effort to conciliate, the minimal jurisdictional requirement of the Act is satisfied and the action is therefore properly before the court. *Id.* Once this initial effort is made, "if the district court finds that further conciliation efforts are required the proper course is to stay proceedings until such informal conciliation can be concluded." *Id.*

Courts have recognized that "[b]ecause conciliation involves at least two parties, we must evaluate one party's efforts with an eye to the conduct of the other party." *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1335 (5th Cir. 1979) (*Sun Oil II*); *see also Marshall v. Hartford Fire Insurance Co.*, 78 F.R.D. 97, 103 (D. Conn. 1978). Conciliation is thus a flexible and responsive process which necessarily differs

from case to case. The EEOC may make a sufficient initial effort without undertaking exhaustive investigations or proving discrimination to the employer's satisfaction, *Sun Oil II*, 605 F.2d at 1334-35, so long as it makes a sincere and reasonable effort to negotiate by providing the defendant an "adequate opportunity to respond to all charges and negotiate possible settlements." *Hartford Fire Insurance Co.*, 78 F.R.D. at 107.

In this case the EEOC informed Prudential of the identity of the charging parties, the specific allegations of misconduct, and the remedy sought by each party, and on several occasions it invited conciliation. The record reveals a series of overtures by the EEOC to which Prudential made no meaningful response. Prudential obviously was aware both that litigation could follow failure to conciliate and of the requirements of the Act. We conclude that the EEOC's initial effort was sufficient under *Sun Oil I*, 592 F.2d at 566-67, particularly in view of Prudential's insistent refusal to undertake any significant dialogue, its outright rejection of the EEOC's initial settlement proposals, and its refusal to offer any serious counterproposals. The trial court properly refused to dismiss the action because, under the circumstances, Prudential was given a reasonable opportunity before suit was filed to respond and negotiate.

In line with *Sun Oil I*, the court exercised its discretion to stay the suit forty-five days to provide the parties an additional opportunity to conduct conciliation. The conciliation proceedings were recorded at Prudential's insistence. The trial court found that the record of these talks was relevant to Prudential's claim that the EEOC had failed initially to negotiate in good faith because this record revealed the pre-filing conciliation in a new light. Based on Prudential's conduct at the recorded meeting, the court observed that the "maneuvering in the correspondence that

was submitted by Prudential" regarding pretrial conciliation was misleading. Rec., supp. vol. I, at 19-20. The court noted "Prudential's almost intransigent resistance to any good faith negotiation and the efforts of the Commission attorney to at least open the door for meaningful conciliation." *Id.* at 19. The court justifiably concluded that Prudential's conduct at this meeting was an accurate reflection of its attitude in the earlier conciliation, and held that Prudential was in no position to object to a lack of good faith conciliation by the EEOC. We agree with this conclusion.

II.

THE PROPOSED PRETEXT INSTRUCTION

Prudential requested the court to instruct the jury that if it found Prudential had offered reasonable factors other than age for the termination or demotion of the complaining employees, the jury had to find for Prudential unless it found that the EEOC had proven that Prudential's explanation for the termination or demotion was a pretext for age discrimination. The court refused "on the theory that even though the jury finds that the explanation of financial difficulties and the necessity for reorganization or other explanations were not mere pretext, if they also find that age discrimination was a determinative factor, the jury could not be peremptorily instructed to decide for the defendant." Rec., vol. VIII, at 956.

In reviewing Prudential's allegation of error we must consider the instructions given as a whole. *McGrath v. Wallace Murray Corp.*, 496 F.2d 299, 301 (10th Cir. 1974). "[N]o particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 656 (10th Cir. 1984); *see also Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1181 (6th Cir. 1983).

In discussing the proper instructions in an ADEA action, we recently stated that

> "The essence of the correct formulation of the standard of proof is that it requires the jury to focus on the effect of the factor of age. The jury must understand that it is not enough that age discrimination figure in the decision to demote or discharge; age must 'make a difference' between termination and retention of the employee in the sense that, 'but for' the factor of age discrimination, the employee would not have been adversely affected."

Perrell, 726 F.2d at 656. In the instant case the jury was properly and thoroughly instructed that the EEOC had to prove that "the age of the employee in question was a determinative factor in defendant's decision to discharge him. That is . . . but for his age, he would not have been so treated." Rec., vol. XV, at 1111. We conclude that the court's instructions accurately set out the relevant legal standards.

Moreover, we agree with the trial judge's reason for refusing Prudential's pretext instruction. An ADEA plaintiff is not required to show that age was the sole motivating factor in the employment decision. *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 82 (2d Cir. 1983); *Blackwell*, 696 F.2d at 1181; *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1315-16 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Smithers v. Bailar*, 629 F.2d 892, 898 (3rd Cir. 1980). Thus a plaintiff need not prove that the reasons offered by the defendant are false if he proves that age was also a reason, and that age was the factor that made a difference. *Hagelthorn*, 710 F.2d at 82; *see Perrell*, 726 F.2d at 656. The instruction requested by Prudential could have misled the jury into thinking that even though it found age to be the determinative factor, it nonetheless

would be required to return a verdict for Prudential unless the EEOC also proved that Prudential's reasons were invalid. Consequently, the trial court properly rejected it.

III.

SUFFICIENCY OF THE EVIDENCE

Prudential argues that the evidence was insufficient to support the jury verdict in favor of Tanner. A judgment notwithstanding the verdict is appropriate only when "the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, *id.*, and "cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury." *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 n.2 (10th Cir. 1981). "[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted." *Id.* at 680. Upon review of the record under the above standards, we conclude that a judgment notwithstanding the verdict is unwarranted.

When both parties have fully presented their evidence, the "central question is whether plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a determinative factor in the employer's decision." *Hagelthorn*, 710 F.2d at 81; *see also United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478, 1482 (1983). In this case the EEOC offered statistical evidence of a significant association between age and discharge, as well as evidence of statements made by Prudential's president and other management personnel,

which the jury reasonably could construe as suggesting that age played a determinative role in the company's selection of employees for termination. In addition, the EEOC's evidence tended to prove that real estate foreclosure activity was substantial at this time due to the economic climate, and that several younger employees carried on Tanner's work after his departure. Although this evidence was not undisputed, it obviously was accepted by the jury and clearly is sufficient to allow a reasonable factfinder to decide that age was a determinative factor in Tanner's discharge.

IV.

FUTURE DAMAGES

In its entry of judgment on the jury verdict, the trial court awarded Tanner $17,000 "as lost retirement and pension benefits accruing through normal retirement, in lieu of reinstatement." Rec., vol. II, at 477. On appeal, Prudential contends that an award of future damages is not authorized by the ADEA, and that even if such damages could be awarded, they were improper in this case because Tanner did not sincerely request reinstatement.

The ADEA incorporates the remedies of the Fair Labor Standards Act (FLSA) as follows:

> "The provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the FLSA], and subsection (c) of this section. . . . *Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title* . . . ."

29 U.S.C. § 626(b) (emphasis added). The FLSA provides the district courts with power to restrain violations of the act. *Id.* § 217. The most pertinent provision, section 216(b), provides:

> "Any employer who violates the provisions of [the Act] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Id. § 216(b). However, the ADEA makes a significant addition to the FLSA remedies by providing that

> "In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."

Id. § 626(b) (emphasis added).

The courts disagree on whether future damages in lieu of reinstatement are available under the ADEA. *See, e.g., O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 574 F. Supp. 214, 216-19 (N.D. Ga. 1982) (discussing cases); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1167 & n.33 (S.D.N.Y. 1983) (citing cases). The Eighth and Ninth Circuits have held that such damages may be awarded under certain circumstances. *See Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier*, 672 F.2d at 1319. The First Circuit has stated that an ADEA plaintiff cannot recover damages for future economic loss.

See Kolb v. Goldring, Inc., 694 F.2d 869, 874 n.4 (1st Cir. 1982).

This court has recently reviewed a case in which the trial court had awarded future damages in lieu of reinstatement. *See Blim v. Western Electric Co.*, 731 F.2d 1473, 1478-79 (10th Cir. 1984). We there recognized the split in the circuits on this issue, but a majority of the panel held that it did not need to resolve the question. *Id.* at 1479. Instead, the majority assumed without deciding that front pay is available under the ADEA, but held that under the circumstances of that case the trial court should have ordered repromotion rather than front pay. Chief Judge Seth, in dissent, would have decided the issue and would have held that front pay is not a remedy contemplated by the ADEA. *Id.* at 1481. We are directly faced with the question in this case.

Although the ADEA provides that violations of the Act generally are to be treated as violations of the Fair Labor Standards Act, the ADEA only selectively incorporates FLSA sections. At the same time, as we have pointed out, the ADEA contains additional remedial provisions not found in the FLSA. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

In a thorough and careful analysis of the question of damages in lieu of reinstatement, the court in *Koyen* concluded:

> "The manifest purpose of this broad grant of legal and equitable power is to enable the courts to fashion whatever remedy is required to fully compensate an

> employee for the economic injury sustained by him. The power so granted is sufficient to authorize an award of future loss of earnings in appropriate cases. To deny that authority would defeat a purpose of the Act to make a victim of discrimination 'whole' and to restore him to the economic position he would have occupied but for the unlawful conduct of his employer. To deny such authority would remove a deterrent force against future violations."

560 F. Supp. at 1168 (footnotes omitted). We agree. The power to grant equitable relief provided in the ADEA clearly stands in addition to the monetary relief available under the FLSA sections and is expressly stated to be without limitation. When we read this section as a whole and construe it liberally, as we must, *see Dartt*, 539 F.2d at 1260, we conclude that the legal and equitable remedies available under the ADEA are not limited either to those specifically listed or to those available under the FLSA, so long as the relief is "appropriate to effectuate the purposes of [the Act]." 29 U.S.C. § 626(b).

We held in *Blim* that reinstatement is the preferred remedy under the ADEA and should be ordered whenever it is appropriate. 731 F.2d at 1479; *see also Gibson*, 695 F.2d at 1101; *Cancellier*, 672 F.2d at 1319. Reinstatement may not be appropriate, however, when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible. *See, e.g., Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281 (8th Cir. 1983); *Cancellier*, 672 F.2d at 1319-20; *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983); *Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 355 (D.N.H. 1981). Under such circumstances, an award of future damages in lieu of reinstatement furthers the remedial purposes of the ADEA by assuring

that the aggrieved party is returned as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct. *See Ventura v. Federal Life Insurance Co.*, 571 F. Supp. 48, 50 (N.D. Ill. 1983). If this were not the case, an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return.[2] *See, e.g., Cancellier*, 672 F.2d at 1319-20.

We recognize that future damages have been criticized as uncertain and speculative. *See, e.g., Foit v. Suburban Bancorp*, 549 F. Supp. 264, 267 (D. Md. 1982). However, given our conclusion that they are available under the ADEA, "[t]he mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability. 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' " *Koyen*, 560 F. Supp. at 1169 (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)). Courts are able to alleviate the uncertainty of future damages by taking into acocunt a discharged employee's duty to mitigate, "the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee's work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards." *Id.* at 1168-69.

In any event, uncertainty is not a relevant consideration in this case because the court did not grant future wages. Tanner's pension had vested at the time of trial and the parties stipulated that the $17,000 in pension benefits would

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[2]A plaintiff need not "request reinstatement as a prerequisite to obtaining front pay where the evidence reveals an atmosphere of hostility." *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (Title VII); *Koyen*, 560 F. Supp. at 1169.

provide Tanner the same pension upon retirement that he would have received had he not been illegally discharged.

In its memorandum supporting its proposed judgment and order filed below, the EEOC stated:

> "Front pay is requested in lieu of reinstatement in that the defendant has steadfastly refused to consider reinstatement as a remedy since the date of receipt of Mr. Tanner's charge of discrimination. It has been two and one-half (2-½) years since Mr. Tanner's discharge and defendant's expressed hostile attitude toward its former employees, both during conciliation attempts and at trial, makes reinstatement a virtual impossibility as a remedy."

Rec., vol. II, at 452. The record contains evidence to support this contention.[3] However, the district judge did not state why future damages are more appropriate than reinstatement. The trial court must make this assessment in the first instance. Accordingly, we remand for the court to reconsider its award of future pension benefits in light of our decision in *Blim* and the analysis set forth above, and to articulate the evidence and rationale underlying its decision.

V.

THE WILLFULNESS INSTRUCTION

The ADEA, 29 U.S.C. § 626(b), provides that amounts owing to a person as a result of a violation of the Act are deemed unpaid minimum wages or unpaid overtime compensation for purposes of section 216 of the FLSA. Under section 216, an employer who violates the FLSA is liable

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[3]Indeed, Prudential has not indicated on appeal that it would prefer reinstatement over the payment of pension benefits.

for these amounts plus "an additional equal amount as liquidated damages."[4] *Id.* § 216(b). However, the ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." Id. § 626(b).

In this case the trial court instructed the jury that

> "A willful violation occurs when a person acts with specific intent to violate the law, where with knowledge of the law he proceeds, or it proceeds to violate the law knowingly and intentionally.
>
> "In other words, you can find willful discrimination for age, or willful violation of the law, only if you find both that Prudential violated the law by discharging or reassigning complaining employees because of their age, and that Prudential knew, or should have known at the time that it decided to discharge or reassign the complaining employees, that such decisions and actions were in violation of the law and were intentionally and knowingly done in violation thereof."

Rec., vol. XV, at 1121-22. On appeal the EEOC contends that this instruction erroneously imposed too strict a standard by requiring proof that the employer specifically intended to violate the law. We agree.

This court has held that a violation of the ADEA is willful when the employer "acted in the face of the ADEA" and was

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[4]The ADEA authorizes the recovery of "liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses . . . that are 'too obscure and difficult of proof for estimate other than by liquidated damages . . . .'" H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 535 (quoting *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583-84 (1942)). "[L]iquidated damages are in the nature of legal relief," *id.*, and "are not intended to take the place of equitable relief." *Dickerson*, 703 F.2d at 280.

"fully aware that the Act was 'in the picture.'" *Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980) (quoting *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972)). In so doing we have adopted the same definition of willfulness that we apply in determining whether a violation of the FLSA is willful for statute of limitation purposes. *See, e.g., id.; EEOC v. Central Kansas Medical Center*, 705 F.2d 1273, 1274 (10th Cir. 1983). Under this standard, "[a] violation may be willful *even if an employer does not have specific knowledge that his actions violate the Act....* Instead, '[a] violation is willful when the employer was, or should have been, congnizant of an appreciable possibility that the employees involved were covered by the statutory provisions.'" *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 85 (10th Cir. 1983) (quoting *Central Kansas Medical Center*, 705 F.2d at 1274) (emphasis added). Accordingly, the instruction given by the court here was erroneous.[5]

The record contains testimony by Prudential executives and members of the board demonstrating that the company in fact knew its employees were protected by the ADEA, and Prudential does not contend to the contrary on appeal. Based on this uncontested evidence, we conclude as a matter of law that Prudential's conduct in terminating Tanner

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[5]Prudential argues that this issue is not properly before us because the EEOC did not propose to the trial court the instruction it now contends should have been given. Although the EEOC objected to the instruction given, the instruction it offered, while approved by several circuits, was not in the form articulated by this court. Even assuming that the EEOC failed properly to preserve the issue for appeal, however, we conclude that the instruction given constituted plain error affecting substantial rights. "[W]e will review instructions not properly objected to at trial where the error is plain and significant." *Fox v. Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir. 1978).

constituted a willful violation within the meaning of the ADEA. *Cf. Sinclair v. Automobile Club of Oklahoma, Inc.*, ____ F.2d ____, ____, Nos. 82-2599, 83-1030, 83-1229, slip op. at 5-6 (10th Cir. 1984).

In so doing we address the question left undecided in *Mistretta*, 639 F.2d at 595 n.4, and hold that the good faith defense of section 11 of the Portal-to-Portal Pay Act, 29 U.S.C. § 260, is not incorporated into the ADEA. This section, which applies to awards of liquidated damages under the FLSA, "grants courts authority to deny or limit liquidated damages where the 'employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith . . . .' " *Lorillard*, 434 U.S. at 581-82 n.8 (quoting 29 U.S.C. § 260). As the Supreme Court pointedly has observed, although the ADEA expressly incorporates other provisions of the Portal-to-Portal Pay Act, "the ADEA does not make any reference to § 11." *Id.* We join those courts that have found this omission significant and conclude that the good faith provsion of section 11 is not available in ADEA cases. *See, e.g., Hill v. Spiegel, Inc.*, 708 F.2d 233, 238 (6th Cir. 1983); *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129-30 (2d Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 981-82 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 279 (3rd Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979).

Once a violation of the ADEA is determined to be willful, the award of liquidated damages is mandatory, and the court is without discretion "to award liquidated damages in an amount other than that equal to the award for compensatory damages." *Hill*, 708 F.2d at 238; *see also* H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* U.S. Code Cong. & Ad. News 528, 535 (ADEA provides liquidated damages calculated as amount equal to pecuniary loss to compensate for nonpecuniary losses arising from willful

violation). Accordingly, plaintiff is entitled to liquidated damages in an amount equal to the $34,200 in pecuniary losses found by the jury.

The judgment is affirmed insofar as it awards plaintiff $34,200 in lost wages. It is reversed insofar as it fails to award liquidated damages, and the case is remanded with directions to enter judgment in the additional amount of $34,200. The judgment is also reversed insofar as it awards plaintiff $17,000 in future pension and retirement benefits, and the case is remanded for reconsideration of this relief in light of this opinion.

NOS. 82-2444 & 83-1073 — EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. PRUDENTIAL FEDERAL SAVING AND LOAN ASSOCIATION.

BARRETT, Circuit Judge, dissenting in part:

I agree with the dissent filed by Chief Judge Seth in *Blim v. Western Elect. Co., Inc.*, 731 F.2d 1473 (10th Cir. 1984) that front pay is not a remedy contemplated by the ADEA. *See also, Kolb v. Goldring*, 694 F.2d 869 (1st Cir. 1982).

Chief Judge Seth carefully reviewed the legislative history of ADEA and he concluded that "allowing front pay runs against the intent of Congress in limiting legal remedies to 'unpaid wages and unpaid overtime compensation.' The court should not use its equitable powers to frustrate the intent of the statute." 731 F.2d at 1481. Judge Seth set forth salutary reasons for the disallowance of front pay, after recognizing that liquidated damages may be recovered for willful violations:

> The front pay damages are too uncertain to be considered "lost wages" or "lost earned benefits." The possibilities of promotions, legitimate demotions, terminations, or death inject too many unknowns. In these

> circumstances the award of front pay is too speculative to be considered pecuniary damages under the statute. The enforcement section of the ADEA was specifically constructed to limit the type of available damages. As mentioned, although the statute grants broad equitable powers those powers cannot be used to expand the legal remedies specifically detailed in the statute. *Id.* at 1481.

In *Plyler v. Doe,* 457 U.S. 202, 242 (1982) the Supreme Court observed that "[T]he Constitution does not constitute us [the Justices of the Supreme Court of the United States] as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' " In like manner the court should be ever cautious not to play the role of a superlegislature.